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October 6, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

Re: Local Multipoint Distribution Service
CC Docket No. 92-297
Ex Parte Meeting

Dear Mr. Caton:

In accordance with Section 1.1206 of the Commission's Rules, I am writing to notify you that Caressa D. Bennet and the undersigned, counsel for the Rural Telecommunications Group ("RTG"), met Friday, October 3, 1997 with John Cimko and Nancy Boocker of the FCC to discuss the resolution of RTG's Petition for Reconsideration of the Second Report and Order in CC Docket No. 92-297. RTG's counsel presented Mr. Cimko and Ms. Boocker with courtesy copies of the brief and reply brief of RTG and the Independent Alliance, Intervenors in Support of Petitioner National Telephone Cooperative Association ("NTCA"), in Case No. 93-1110 in the Court of Appeals for the District of Columbia Circuit. That case deals with the same issues presented in RTG's petition for reconsideration.

Should you require any additional information, please feel free to contact this office.

Sincerely,

Gregory W. Whiteaker

Enclosures

cc: John Cimko (w/o enclosures)
Nancy Boocker (w/o enclosures)
Stephen G. Kraskin (w/o enclosures)

ORAL ARGUMENT NOT SCHEDULED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 93-1110
(and consolidated cases)

JAMES L. MELCHER,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT BRIEF OF INTERVENORS RURAL TELECOMMUNICATIONS GROUP and INDEPENDENT ALLIANCE IN SUPPORT OF PETITIONER NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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August 6, 1997

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), intervenors, the Rural Telecommunications Group ("RTG") and the Independent Alliance ("IA"), (hereinafter, "Intervenors"), by their attorneys, hereby certify that:

A. Parties and Amici

All parties, intervenors and amici appearing in this Court are listed in the Brief of Petitioners United States Telephone Association, *et al.*

B. Rulings Under Review

Petitioners National Telephone Cooperative Association and United States Telephone Association, *et al.* seek review of an order of the Federal Communications Commission ("FCC" or "Commission"), *In re* Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to designate the 27.5 - 29.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order*, CC Docket No. 92-297, FCC 97-82, 62 Fed. Reg. 23148 (April 29, 1997) ("*Order*").

C. Related Cases

References to related cases appear in the Brief for Petitioner National Telephone Cooperative Association. These cases have been transferred to this Court and consolidated in Case No. 93-1110 (and consolidated cases) pursuant to the court's order of July 16, 1997. Intervenors are aware of no other related cases.

Respectfully submitted,

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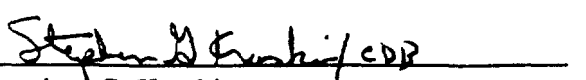

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Dated: August 6, 1997

DISCLOSURE OF INTERESTS STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, intervenor, the Rural Telecommunications Group ("RTG"), hereby submits this disclosure of interests.

RTG is a group of over sixty rural telecommunications companies providing telecommunications services via wireline and wireless technologies throughout rural portions of the country. These companies formed RTG to share in the costs of advocating their interests before the FCC, state regulatory agencies, Congress and the courts. RTG does not have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 26.1.

Respectfully submitted,

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Attorneys for
Rural Telecommunications Group

Dated: August 6, 1997

DISCLOSURE OF INTERESTS STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, intervenor, Independent Alliance ("IA"), hereby submits this disclosure of interests.

IA is a non-profit group of rural telephone companies that monitors and participates in Federal Communications Commission proceedings that affect the provision of communications services to rural areas. IA is composed of rural telephone companies that individually, either, (a) have no parent companies, subsidiaries, or affiliates for whom disclosure is required by F.R.A.P. 26.1 or (b) are cooperative telephone companies owned collectively by their subscribers.

Respectfully submitted,

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Attorneys for
Independent Alliance

Dated: August 6, 1997

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GLOSSARY

BTA	Basic Trading Area
FCC	Federal Communications Commission
ILEC	Incumbent Local Exchange Carrier
LEC	Local Exchange Carrier
LMDS	Local Multipoint Distribution Service
MTA	Major Trading Area
MVPD	Multichannel Video Programming Distributor
PCS	Personal Communications Service
RBOC	Regional Bell Operating Company

IN THE
UNITED STATES COURT OF APPEALS
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Case No. 93-1110
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JAMES L. MELCHER,

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FEDERAL COMMUNICATIONS COMMISSION
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JOINT BRIEF OF INTERVENORS RURAL TELECOMMUNICATIONS GROUP and INDEPENDENT ALLIANCE IN SUPPORT OF PETITIONER NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

STATEMENT OF JURISDICTION

Petitioner National Telephone Cooperative Association ("NTCA") properly asserts jurisdiction under 28 U.S.C. §§ 2342 and 2344 and 47 U.S.C. § 402(a). The undersigned Intervenors each participated before the FCC in the proceeding below.

STATUTES AND REGULATIONS

Except for 47 U.S.C. § 214 which is contained in the Addendum, and 47 U.S.C. § 251 which is contained in the Brief for Petitioners United States Telephone Association, *et al.*, all applicable statutes, etc., are contained in the Brief for Petitioner NTCA.

ISSUES PRESENTED

1. Whether the FCC violated Section 309(j) of the Communications Act of 1934, as amended ("the Act") by imposing a restriction on the eligibility of rural telephone companies to acquire certain Local Multipoint Distribution Service ("LMDS") licenses.

2. Whether the FCC acted arbitrarily or capriciously in adopting the LMDS eligibility restriction.

STATEMENT OF THE CASE

Members of the Rural Telecommunications Group ("RTG") and the Independent Alliance ("IA") (collectively, "Intervenors") are "rural telephone companies"[1] or affiliates of rural telephone companies who seek to utilize the 1,150 megahertz-wide block of spectrum designated by the FCC as the "A Block frequencies," to provide LMDS within a significant portion of their

[1] For the purpose of competitive bidding, the Commission defines a rural telephone company as a local exchange carrier including any affiliates with 100,000 or fewer access lines. 47 C.F.R. § 1.2110.

rural telephone service area.[2] The A Block LMDS spectrum presents a significant opportunity for rural telephone companies to provide broadband services to rural America at an economical cost. RTG and IA members intend to use the spectrum to provide two-way voice, video, data and Internet services to less densely populated rural areas that are too costly to serve using traditional copper, coaxial and fiber.

RTG and IA filed comments before the FCC opposing adoption of an in-region eligibility restriction on the A Block frequencies for rural telephone companies. The Order under review ("*Order*") nonetheless adopted an eligibility restriction that prohibits incumbent Local Exchange Carriers ("ILECs"), including rural telephone companies, from acquiring and holding licenses for the A Block frequencies where the LMDS license area significantly overlaps their existing telephone service areas (hereinafter referred to as "in-region") for a three year period. *Order* ¶¶ 160, 179. The *Order* also adopted lax performance requirements that, when combined with the in-region eligibility restriction, thwart the "rapid deployment of new technologies, products and services . . . to those residing in rural areas . . . ." 47 U.S.C. § 309(j)(3)(A). *See Order* ¶¶ 266-270.

Sections 309(j)(3) and (4) of the Act specify the requirements the FCC must follow in conducting its competitive bidding process and in determining who is eligible to hold licenses awarded through that process. Section 309(j)(4)(D) directs the FCC to ensure that rural telephone companies are "given the opportunity to participate in the provision of spectrum-based

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[2] The FCC designated a smaller 150 megahertz-wide block of spectrum as the "B Block frequencies" which does not have the capability to provide the same range of services. *Order* ¶ 182. Accordingly, unless otherwise noted, subsequent references to LMDS are to A Block LMDS.

services." 47 U.S.C. § 309(j)(4)(D). Section 309(j)(3)(B) specifically requires the FCC to seek to promote dissemination of licenses among a wide variety of applicants, including rural telephone companies. 47 U.S.C § 309(j)(3)(B). By including rural telephone companies in the eligibility restriction, the *Order* violates the unambiguous mandate of Sections 309(j)(3) and (4) of the Act. The FCC's sole reliance on the marketplace as a means of fulfilling its Section 309(j) mandate is an abdication of the specific requirement that it "shall seek to promote" the dissemination of licenses to rural telephone companies and the rapid deployment of service to rural America. In adopting its *Order*, the FCC acted in contravention of Sections 309(j)(3) and (4).

STANDARD OF REVIEW

The Court must analyze the FCC's decision under the standard for reviewing an administrative agency's interpretation of a statute set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Under *Chevron*, when the agency's determination relates to the implementation of a statute, the court reviews the agency's actions pursuant to a two-step inquiry. The two-step inquiry begins with a determination of whether Congress spoke directly to the matter at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-3 (footnote omitted). Under the second prong of *Chevron*, the FCC's interpretation must be struck down if it is unreasonable.

The Court must also set aside the FCC's decision if it is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard

of Section 706(2)(A) of the Administrative Procedure Act ("APA"), the court must determine whether the agency considered the relevant factors involved in reaching a decision and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The agency must articulate a "rational connection between the facts found and the choice made." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). An agency must support any "predictive" conclusions it relies upon when making a determination. *Century Communications Corp. v. FCC*, 835 F.2d 292, 300-02 (D.C. Cir. 1987). Careful scrutiny is especially warranted where eligibility restrictions are based on FCC speculation rather than on hard evidence, *see Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995).

SUMMARY OF ARGUMENT

Section 309(j) is clear on its face that the FCC must (1) ensure that rural telephone companies are given an opportunity to participate in the provision of LMDS and (2) ensure the rapid deployment of LMDS to those residing in rural areas. The *Order's* imposition of in-region eligibility restrictions on rural telephone companies violates the plain meaning of Section 309(j). Although the FCC may adopt some competitive bidding restrictions to avoid excessive concentration of licenses, Congress specifically directed the FCC to avoid such concentrations by disseminating licenses to rural telephone companies. Accordingly, the FCC lacked authority to limit rural telephone company participation in the provision of LMDS.

Even assuming the Act empowers the FCC to limit rural telephone company participation, the FCC's decision in the *Order* is arbitrary and capricious. The FCC failed to support its prediction that rural telephone companies would engage in anticompetitive behavior and its conclusion that the eligibility restriction is necessary to increase competition in rural areas and to ensure that rural customers receive LMDS at reasonable rates.

The FCC's conclusions that rural telephone companies are too small to trigger the restriction and that geographic partitioning will ameliorate the impact of the restriction are equally unsupported. The FCC also failed to consider record evidence.

The FCC's conclusion that the restriction will not hinder rural deployment of LMDS is arbitrary and capricious. Competitive forces alone will not ensure the deployment of service to high cost rural areas. Congress has recognized the unique competitive characteristics of rural markets and mandated universal service objectives and support mechanisms pursuant to Section 254 of the Act. The *Order* frustrates these objectives. Finally, the lack of meaningful performance requirements required by Section 309(j) hinders the deployment of service to rural America.

ARGUMENT

Sections 309(j)(3) and (4) of the Act, which contain statutory language that require the FCC to promote the dissemination of licenses to rural telephone companies, *see* 47 U.S.C. § 309(j)(3)(B), and to ensure "the rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas . . . . " 47 U.S.C. § 309(j)(3)(A). Congress enacted these provisions to ensure that rural Americans have the same

access to telecommunications services as their urban counterparts. Congress recognized that due to the economic and geographic impediments associated with serving high cost rural areas, rural telephone companies, with roots (and infrastructure) firmly established in the rural communities in which they operate, were key to carrying out the goal of bringing advanced telecommunications services to rural Americans.

The FCC's inclusion of rural telephone companies in its in-region eligibility restriction directly contravenes both Sections 309(j)(3) and (4) and therefore fails the first prong of *Chevron*. *Chevron*, 467 U.S. 837, 842. Assuming *arguendo* that Sections 309(j)(3) and (4) of the Act did not plainly prohibit the FCC from restricting rural telephone company eligibility, the FCC's basis for inclusion of rural telephone companies is arbitrary and capricious and is so entirely unsupported by the record that it amounts to an unprecedented abuse of discretion. Accordingly, the eligibility restriction must be struck down, at least with respect to rural telephone companies.

I. THE ORDER'S RURAL TELEPHONE COMPANY ELIGIBILITY RESTRICTIONS VIOLATE SECTIONS 309(j)(3) AND (4) OF THE COMMUNICATIONS ACT

Under *Chevron*, where the language of a statute is clear on its face, an administrative agency cannot interpret such statute in a manner that is inconsistent with the plain language of that statute. 467 U.S. at 842. The language of Sections 309(j) (3) and (4) of the Act cannot be more clear. Section 309(j)(3) states, in pertinent part:

> [T]he Commission shall include safeguards to protect the public interest in the use of the spectrum and **shall** seek to promote the purposes specified in section 1 of this Act and the following objectives:

* * *

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses **and by disseminating licenses among a wide variety of applicants, including** small businesses, **rural telephone companies** and businesses owned by members of minority groups and women.

* * *

47 U.S.C. § 309(j)(3)(B) (emphasis added). Section 309(j)(4)(D) states, in pertinent part:

* * *

In prescribing regulations pursuant to paragraph (3), the Commission **shall** --

(D) ensure that small businesses, **rural telephone companies**, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services and for such services consider, the use of tax certificates, bidding preferences, and other procedures;

* * *

47 U.S.C. § 309(j)(4)(D) (emphasis added).

The FCC's decision to restrict rural telephone companies from providing LMDS in their service areas directly contradicts the language of Sections 309(j)(3) and (4), which unambiguously directs the FCC to disseminate licenses to rural telephone companies and ensure that rural telephone companies receive specific opportunities to participate in the provision of spectrum-based services like LMDS. Sections 309(j)(3) and (4) of the Act impose on the FCC, in unambiguous terms, an affirmative obligation to design auction procedures that provide rural telephone companies a meaningful opportunity to participate in new spectrum-based services like

LMDS. This obligation is related to, but independent of, the FCC's similar obligation to other "designated entities."[3]

The obligation to ensure rural telephone companies such opportunities stems from Congress's recognition that rural telephone companies have historically provided telecommunications services to rural areas that other entities, large and small, were unwilling to serve. The FCC itself has recognized that rural telephone companies are uniquely positioned to most fully serve the populations of rural America. *See In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5597-99 (1994).

In assessing the propriety of eligibility restrictions which apply to all ILECs without differentiation, the FCC failed to consider rural telephone companies' unique status under Section 309(j). The Regional Bell Operating Companies ("RBOCs") and large independent LECs are not designated entities under Section 309(j). Rural telephone companies are. The FCC has effectively stripped rural telephone companies of their designated entity status by lumping them in with the RBOCs and large independent LECs in the application of the eligibility restriction.

In adopting its LMDS eligibility restrictions, the FCC failed to "ensure" through its auction rules that licenses are disseminated to rural telephone companies in direct violation of the

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[3] The enumerated entities in Section 309(j) (*i.e.*, rural telephone companies, small businesses, businesses owned by members of minority groups, and businesses owned by women) have been collectively referred to as "designated entities." *See generally, In re* Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994).

plain language of Section 309(j)(3)(B) and that rural telephone companies "are given the opportunity to participate in the provision of" LMDS in clear and direct violation of the plain language of Section 309(j)(4)(D). 47 U.S.C. § 309(j)(3)(B), (4)(D).

The FCC contends that LMDS licenses may be disseminated by means other than the acquisition of LMDS licenses at auction, for example, through a subsequent purchase of a license from an auction winner or through "partitioning" a portion of the auction winner's license.[4] However, these alternative means of obtaining LMDS licenses do not satisfy the FCC's obligations spelled out in Section 309(j).[5] Section 309(j)(3)(B) requires the FCC to proactively ensure the accessibility of advanced wireless telecommunications to the American people "by *disseminating* licenses." 47 U.S.C. § 309(j)(3)(B) (emphasis added). Section 309(j)(3)(B)'s use of the verb "disseminate" requires *action* on the part of the FCC. Congress dictated that licenses be disseminated *by the FCC*, not by the post-auction marketplace. Indeed, the U.S. Court of Appeals for the Sixth Circuit has concluded that Section 309(j)(3)(B)'s use of the phrase "including . . . rural telephone companies" is "illustrative of Congress' particular concern that these groups participate *in the auctions*." *Cincinnati Bell*, 69 F.3d at 762 (emphasis added).

The FCC cites to *Cincinnati Bell* for support for its authority to "place restrictions on the

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[4] Partitioning is the subdivision of a license area into two or more smaller geographic license areas.

[5] The FCC's reliance on rural telephone companies obtaining licenses for the smaller B Block LMDS licenses also fails to satisfy the mandate that licenses be disseminated to rural telephone companies. A 150 megahertz-wide license does not have the broadband capability of a 1,150 megahertz-wide license and cannot provide the range of services. *See Order* ¶ 182. Therefore, contrary to the FCC's unsupported contentions, a 150 megahertz license cannot be considered a comparable substitute. *Order* ¶ 180.

bidding process in order to ensure that a wide variety of applicants are [sic] able to meaningfully participate." *Order* ¶ 158 n. 245 and accompanying text (quoting *Cincinnati Bell*, 69 F.2d 761-762). The FCC fails to recognize that rural telephone companies are among the very specific category of entities to whom it must disseminate licenses. Ironically, the court in *Cincinnati Bell* found the FCC's imposition of eligibility restrictions, similar to the ones at issue in the present case, to be arbitrary. *Id.* at 759, 762. While the court found that the FCC has authority "to establish at least some eligibility criteria to promote competition and avoid undue concentration of licenses," *id.* at 762, Section 309(j) clearly directs the FCC to avoid this concentration of licenses by disseminating licenses to a class of applicants including rural telephone companies. 47 U.S.C. § 309(j)(3)(B). Accordingly, *Cincinnati Bell* provides no support for the FCC's restriction on rural telephone company participation in LMDS.

II. THE FCC'S ORDER IS ARBITRARY AND CAPRICIOUS

As discussed in Section I, *supra*, Section 309(j) is clear and unambiguous in its Congressional directive that the FCC ensure rural telephone companies an opportunity to participate in the provision of spectrum-based services and ensure that residents of rural areas enjoy the rapid deployment of new technologies, products, and services such as LMDS. 47 U.S.C. § 309(j)(3)(A), (B), 4(D). As discussed in Section I(A), *supra*, the FCC's eligibility restrictions directly thwart the plain objectives of Section 309(j), and are unsustainable under *Chevron*.

Even assuming *arguendo* that the FCC has not impermissibly interpreted the Act as

giving it authority[6] to limit the participation of rural telephone companies (rather than *promote* it, as required by Section 309(j)), the FCC has failed to supply a "reasoned basis" for its decision supported by the record. Accordingly, application of the eligibility restriction to rural telephone companies is arbitrary and capricious and contrary to law in violation of both Section 706 of the APA and *Chevron*.

A. The FCC's Application of the In-Region Eligibility Restriction To Rural Telephone Companies Is Arbitrary, Capricious, an Abuse of Discretion and Contrary to Law

The FCC' application of the in-region eligibility restrictions to rural telephone companies is arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. The imposition of such restriction does not satisfy the FCC's stated objectives, the FCC failed to adequately consider record evidence, the FCC's conclusions lack a reasoned explanation, and the record does not support the FCC's predictions.

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[6] For the purpose of this argument, the question "is not whether the FCC has the authority to place certain restrictions on the bidding process, but whether the FCC 'has said enough to justify, in the face of the objections lodged with it, the particular restrictions that it imposed....'" *Cincinnati Bell* 69 F. 3d 752, 763 (quoting *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. (1992)).

1. The FCC Lacks Support for It Predictions and Its Actions Fail to Satisfy the FCC's Stated Objectives

In the *Order*, the FCC stated:

> Our overall goal in assessing the need to restrict the opportunity of any class of service providers to obtain and use spectrum to provide communications services has been to determine whether the restriction is a necessary step in ensuring that consumers will receive efficient communications services at reasonable charges.

Order ¶ 157. The FCC also stated that its primary goal in the *Order* was to increase competition in the local telephone and Multichannel Video Programming Distribution ("MVPD") markets, *id.* ¶ 159, and clarified that it would evaluate the need for eligibility restrictions based on whether they were necessary to promote competition. *Id.* ¶ 157. The FCC also expressed a "corresponding concern with providing opportunities for small operators." *Id.* After determining that the eligibility restrictions were necessary to promote competition, *id.*, the FCC expressly concluded that the imposition of the eligibility restriction met the auction goals of Section 309(j) of the Act. Specifically, the FCC concluded that the restrictions promote economic opportunity and competition, and avoid excessive concentration of licenses, by disseminating LMDS licenses among a wide variety of applicants. *Order* ¶ 181.

As applied to rural telephone companies, however, the eligibility restrictions do not meet the FCC's stated objectives. In addition, the FCC's predictions with respect to rural telephone companies are unsupported by the record and the FCC's conclusions lack reasoned justification. The FCC has failed to articulate the rational connection between the facts found and the choice made, as required by *City of Brookings,* thus the decision is arbitrary and capricious. *City of Brookings*, 822 F.2d at 1165.

There is no basis in the record for concluding that limiting rural telephone company

participation is necessary to ensure that rural America receives LMDS at reasonable charges. As numerous commenters advised the FCC, rural telephone companies, because of their existing infrastructure and presence, are in the best position to deploy service to rural America at a reasonable cost. Comments of the Ad Hoc Rural Telecommunications Group ("Ad Hoc RTG") (predecessor-in-interest to RTG) at 5-6 (Aug. 12, 1996); NTCA Comments at 2 (Aug. 12, 1996); IA Reply at 2 (Aug. 22, 1996). Indeed, if it is necessary to exclude rural telephone companies from providing LMDS in their service areas, then why does the FCC conclude that because of their size, rural telephone companies are unlikely to trigger the eligibility restriction? Order ¶ 180, ¶ 194 n. 302. The FCC can not have it both ways. In *Cincinnati Bell*, the court found that this kind of waffling amounted to arbitrary decisionmaking. *Cincinnati Bell*, 69 F.3d at 762.

The FCC's contention that limiting rural telephone company participation will increase competition in the telephony and MVPD markets is also unsupported by the record. In its *Order*, the FCC relied on what it characterizes as general economic theory, but utterly failed to consider the structure and competitive make-up of rural areas. The application of general economic theory leads to incorrect predictions of the anticipated effect of imposing eligibility restrictions on rural telephone companies. There is similarly no basis for concluding that the restrictions will meet the FCC's stated objective of increasing competition in the rural telephony and MVPD markets. Congress has repeatedly recognized in its legislation that competitive forces behave differently in rural America. *See* discussion in Section II.B, *infra*.

The FCC's decision to limit the participation of rural telephone companies in the provision of LMDS requires support from the record, not "'predictive judgment' as to the possible future behavior of [the] future marketplace." *Cincinnati Bell*, 69 F.3d at 760. The court